(3)

No. 86-6139

Supreme Court, U.S.
FILED
MAR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

CLARA WATSON,

Petitioner,

v.

FORT WORTH BANK & TRUST,

Respondents.

PENDING APPLICATION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

John W. Howard
State Bar No. 10071300
Candy, Kitchener, Swindle
Whitaker & Pratt
2501 Parkview Drive
Suite 600
Fort Worth, Texas 76102
(817) 878-0575

ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Is the racially adverse impact of an employer's practice of simply committing employment decisions to the unchecked discretion of a white supervisory corps subject to the test of Griggs vs. Duke Power Co., 401 U.S. 424 (1971)?

2. Does the use of different mathematical statistics to measure the varying results of an employer's racial bias necessarily preclude certification of one class of all victims of the bias?

3. Is joinder practicable among the past, present and future employees of an employer, of whom fifteen are past or present employees, and several of whom are unaware of their injuries?

4. Having disregarded one of several factual findings and conclusions of law of a district court's Title VII Judgment, ought a Court of Appeals return the case to the district court to let the lower court reconsider its judgment.

5. Is a district court's acceptance, in a Title VII case, of an employer's mutually contradictory explanations over a sequence of employment decisions, clearly erroneous?

LIST OF PARTIES

All parties to the proceeding before the United States Court of Appeals for the Fifth Circuit appear in the present caption.

TABLE OF CONTENTS

QUESTIONS PRESENTED..... i

LIST OF PARTIES..... ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES..... v

OPINIONS AND JUDGMENTS BELOW..... 2

JURISDICTION..... 2

STATUTES AND RULES INVOLVED..... 2

STATEMENT OF THE CASE..... 2

REASONS FOR DENYING THE WRIT..... 6

I. THE FIFTH CIRCUIT'S APPLICATION OF THE DISPARATE TREATMENT ANALYSIS TO PLAINTIFF'S INDIVIDUAL CLAIM OF DISCRIMINATION IN EMPLOYMENT IS CONSISTENT WITH THE RATIONALE AND OPINIONS OF THIS HONORABLE COURT AND THE PRIOR OPINIONS OF THE FIFTH CIRCUIT COURT OF APPEALS..... 6

II. THE FIFTH CIRCUIT'S RECOGNITION OF THE USE OF THE DIFFERENT MATHEMATICAL STATISTICS TO MEASURE THE VARYING RESULTS OF AN EMPLOYER'S ACTS IN HIRING AND PROMOTION DOES NOT PRECLUDE CERTIFICATION OF THESE TWO GROUPS INTO A SINGLE CLASS..... 11

III. THE FIFTH CIRCUIT'S DECERTIFICATION OF THE EMPLOYEE CLASS ON THE BASIS THAT IT FAILED TO MEET THE NUMEROSITY REQUIREMENT OF RULE 23(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS NOT IN CONFLICT WITH THE DECISIONAL LAW OF THE SIXTH, EIGHTH, AND TENTH CIRCUITS..... 15

IV. THE FIFTH CIRCUIT'S ACTION IN DISREGARDING CERTAIN EVIDENCE AND PROCEEDING TO AFFIRM THE TRIAL COURT'S JUDGMENT ON THE BASIS OF THE REMAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED BY THE TRIAL COURT WAS NOT IN CONFLICT WITH THIS HONORABLE COURT'S DECISION IN LEHMAN V. TROUT, 465 U.S. 1056 (1984)..... 18

V. THE FIFTH CIRCUIT'S HOLDING THAT THE TRIAL COURT'S FINDING THAT THE BANK'S EXPLANATIONS FOR ITS ACTIONS WERE NOT PRETEXTS FOR DISCRIMINATION WAS NOT CLEARLY ERRONEOUS WAS PROPER AND IN ACCORD WITH THE DECISIONS OF THIS HONORABLE COURT AND NOT IN CONFLICT WITH THE DECISIONAL LAW OF THE SECOND, EIGHTH, AND ELEVENTH CIRCUITS..... 21

CONCLUSION..... 24

TABLE OF AUTHORITIES

Cases:	Page
Anderson v. Bessemer City ____ U.S. ____ S.Ct. ____ 84 L.Ed.2d 518 (1985)	21, 22
Carroll v. Sears Roebuck Co. 708 F.2d 183 (5th Cir. 1983)	6, 7
Cross v. National Trust Life Insurance Co. 553 F.2d 1026 (6th Cir. 1977)	16
Foster v. Sparks 506 F.2d 805 (5th Cir. 1975)	15
Gen. Tel. Co. of Southwest v. Falcon 457 U.S. 147 (1982)	11, 12, 13
Gold Strike Stamp Co. v. Christensen 436 F.2d 791 (10th Cir. 1970)	16
Grant v. Bethlehem Steel Corp. 635 F.2d 1007 (2nd Cir. 1980)	23
Griffin v. Carlin 755 F.2d 1516 (11th Cir. 1985)	10
Griggs v. Duke Power Co. 401 U.S. 424 (1971)	7, 9
Hawkins v. Bounds 752 F.2d 500 (10th Cir. 1985)	9
Holsey v. Armour & Co. 743 F.2d 199 (4th Cir. 1984)	14, 15
Horn v. Associated Wholesale Grocers, Inc. 555 F.2d 270 (10th Cir. 1977)	17
Hornreich v. Plant Industries, Inc. 535 F.2d 550 (9th Cir. 1976)	15
International Brotherhood of Teamsters v. United States 431 U.S. 324 (1977)	7, 8, 9
Jenkins v. Raymark Industries Inc. 782 F.2d 468 (5th Cir. 1986)	11, 15
Lehman v. Trout 465 U.S. 1056 (1984)	18, 19, 20

Lewis v. N.L.R.B.
750 F.2d 1266 (5th Cir. 1985)..... 6

McDonnell Douglas Corp. v. Green
411 U.S. 792 (1973)..... 3, 8

McKenzie v. Sawyer
684 F.2d 62 (D.C. Cir. 1982)..... 15

Paxton v. Union National Bank
688 F.2d 552 (8th Cir. 1982)..... 14, 17, 23

Pouncy v. Prudential Insurance Co. of America
668 F.2d 795 (5th Cir. 1982)..... 6, 7

Pullman-Standard v. Swint
456 U.S. 273 (1982)..... 21

Rowe v. Cleveland Pneumatic Co.,
Numerical Control, Inc.
690 F.2d 88 (6th Cir. 1982)..... 21

United States v. United States Gypsum Co.
333 U.S. 364 (1948)..... 21

Watson v. Fort Worth Bank & Trust
798 F.2d 791 (5th Cir. 1986)..... 12, 13, 21

Wright v. Stone Container Corp.
524 F.2d 1058 (8th Cir. 1975)..... 15

Statutes, Codes and Rules:

42 U.S.C. sec. 2000e-2(h)..... 3, 4

FED. R. CIV. P. 23..... 6, 7, 8

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

CLARA WATSON,

Petitioner,

V.

FORT WORTH BANK & TRUST,

Respondent.

PENDING APPLICATION FOR WRIT OF CERTIORARI
FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN RESPONSE TO PETITION FOR CERTIORARI

To The Honorable Court, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Respondent herein prays that a Writ of Certiorari be denied to the United States Court of Appeals for the Fifth Circuit in that the Fifth Circuit's judgment and opinion of August 27, 1986 is correct and not in conflict with decisional law of other circuits.

OPINIONS AND JUDGMENTS BELOW

Pursuant to Rule 22 and 34.2 of the Supreme Court Rules, Respondent omits citations to the opinions and judgments delivered in the courts below in that same is accurately set forth in Petitioner's Application for Writ of Certiorari.

JURISDICTION

Pursuant to Rule 22 and 34.2 of the Supreme Court Rules, Respondent omits a statement of jurisdiction on the basis that Petitioner has accurately set forth the jurisdictional grounds in its Application for Writ of Certiorari.

STATUTES AND RULES INVOLVED

Pursuant to Rule 22 and 34.2 of the Supreme Court Rules, Respondent has omitted setting forth the constitutional provisions, treaties, statutes, ordinances, and regulations which the case involves on the basis that this information has been accurately set forth by Petitioner in its Application for Writ of Certiorari.

STATEMENT OF THE CASE

Pursuant to Rule 22 and 34.2 of the Supreme Court Rules, Respondent omits a statement of the case on the basis that Petitioner's statement of the case as set forth in its Application for Writ of Certiorari is essentially accurate. However, Respondent objects to the argumentative portions of the statement of the case as set forth in Petitioner's Application for Writ of Certiorari.

SUMMARY OF ARGUMENT

Pursuant to Rule 34.1(h) of the Supreme Court Rules, the following is a brief condensation of the argument contained in Respondent's Brief in Response to Application for Writ of Certiorari. Pursuant to Rule 34.1(h) of the Supreme Court Rules:

Under Point I, Respondent argues that the Fifth Circuit correctly applied the disparate treatment analysis found under McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1978), to the facts in the instant case. The disparate impact analysis, which Petitioner argues should apply to the facts in the instant case, is the improper analysis under the facts in the case at bar. The Supreme Court of the United States has held that the disparate impact analysis should be used in situations where there is a specific, facially neutral selection criterion that can be shown to have a causal connection to a racial imbalance in the work force. However, where the facts of a particular case show that the pertinent employment decision is made on a discretionary and subjective basis, the disparate treatment analysis is applicable. The facts in the case at bar reflect that the disparate treatment analysis was the proper analysis by which to evaluate Petitioner's claim for discrimination in employment.

Respondent argues under Point II that the Fifth Circuit was correct in holding that the Trial Court did not abuse its discretion in decertifying the class of applicants on the basis

that Petitioner was not an adequate representative of the applicant class. It is Respondent's position that the significant difference in the statistical evidence presented by the applicant class versus the employee class, clearly showed that Petitioner was not an adequate representative for the applicant class. However, contrary to Petitioner's assertions, the Fifth Circuit's holding does not stand for the proposition that merely because two identifiable groups are required to use different mathematical statistics in presenting their case, that this precludes certification of those two groups and to a single class.

Respondent argues in Point III that the Fifth Circuit correctly held that the Trial Court did not abuse its discretion in decertifying the employee class on the basis that said class could not satisfy the numerosity requirement of Rule 23(a) of the Federal Rules of Civil Procedure. The Fifth Circuit's holding is not in conflict with the decisional law of other circuits as Petitioner contends, rather, the Fifth Circuit applied the well settled abuse of discretion standard in reviewing the Trial Court's rulings on matters of class certification.

Respondent argues in Point IV that the Fifth Circuit correctly affirmed the Trial Court's judgment in finding that the bank's explanations for its actions were not pretexts for discrimination. Petitioner has asserted that the Fifth Circuit set aside an underpinning of the District Court's Title VII Judgment, and thereafter proceeded to render judgment rather

than returning the case to the Trial Court for reconsideration. Respondent contends that the Fifth Circuit did not strike an underpinning of the Trial Court's judgment. Rather, the Fifth Circuit gave Petitioner the benefit of the doubt and disregarded certain admissible evidence which was properly considered by the Trial Court but not asserted by the bank. After disregarding this evidence favorable to Respondent, the Fifth Circuit, in applying the "clearly erroneous" standard, nevertheless affirmed the Trial Court's holding that the explanations offered by the bank were not pretexts for discrimination.

Respondent argues under Point V that the Fifth Circuit correctly applied the "clearly erroneous" standard in affirming the Trial Court's holding that the bank's explanations for its actions were not pretexts for discrimination. Although the bank's explanations for its actions may have contained certain inconsistencies, the Fifth Circuit correctly held that the inconsistencies were not so striking as to make the banks proferred reasons incredible. The Fifth Circuit correctly found that there were two permissible views of the evidence, and, therefore, the Trial Court's holding was not clearly erroneous. Furthermore, the application of the "clearly erroneously" standard is not in conflict with the decisional law of other circuits, rather, is the well settled standard of review.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT'S APPLICATION OF THE DISPARATE TREATMENT ANALYSIS TO PLAINTIFF'S INDIVIDUAL CLAIM OF DISCRIMINATION IN EMPLOYMENT IS CONSISTENT WITH THE RATIONALE AND OPINIONS OF THIS HONORABLE COURT AND THE PRIOR OPINIONS OF THE FIFTH CIRCUIT COURT OF APPEALS.

The Fifth Circuit Court of Appeals has held that a challenge to an allegedly discretionary promotion procedure fits within the "disparate treatment" analysis, rather than the "disparate impact" analysis under Title VII. (Emphasis ours). Lewis v. N.L.R.B., 750 F.2d 1266 (5th Cir. 1985); Carroll v. Sears Roebuck Co., 708 F.2d 183 (5th Cir. 1983); Pouncy v. Prudential Insurance Co. of America, 668 F.2d 795 (5th Cir. 1982). One must note the emphasis on the word "discretionary" in describing the particular promotion procedure. Where the promotion procedure is a purely discretionary procedure, the Fifth Circuit has followed established precedence in applying the disparate treatment analysis. However, where there exists a specific, facially neutral selection criterion or procedure, the disparate impact model or analysis may be applicable. This distinction was pointed out by the Fifth Circuit in Carroll. In that case, on appeal, Plaintiff contended that the evidence presented to the District Court established a prima facie case of racial discrimination under the disparate impact theory in hiring, promotion, job classification, training, termination, and testing practices of Sears. The evidence reflected that in all areas except the testing practices that the decisions were largely discretionary and subjective. The Court held:

> We conclude, however, that the proof adduced at trial does not fit the disparate impact model. The use of subjective criteria to evaluate employees in hiring and job placement decisions is not within the category of facially neutral procedures to which the disparate impact model is applied. (citations omitted). With respect to training, promotion, termination and job classification, the Plaintiffs have failed to focus on a facially neutral, objective employment practice that the disparate impact model was designed to test. Under Pouncy, the disparate impact model can no longer serve as a vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices. Pouncy, 668 F.2d at 800. We must therefore analyze the Plaintiff's challenge to Sears employment practices under the disparate treatment model. The only employment practice subject to analysis under the disparate impact model is Sears testing of employees. See Griggs v. Duke Power Co., 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed. 2d 158 (1971). The use of a test is a specific, facially neutral selection criterion that can be shown to have a causal connection to a racial imbalance in the work force. This selection criterion is the kind of employment practice to which the disparate impact model traditionally has applied.
>
> Carroll, 708 F.2d at 188-189.

The Court in Carroll went on to hold that the evidence adduced at trial failed to show that the lower scores of blacks on the test was a factor in employment decisions that caused fewer blacks to be selected.

This same distinction was noted by this Honorable Court in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 52 L.Ed. 2d 396, 97 S.Ct. 843 (1977). In Teamsters, the United States brought suit against a private employer and against the Teamsters Union alleging that the company had engaged in a

pattern or practice of discriminating against minorities in hiring so called "line drivers". The government alleged that the minorities had been hired and were given lower paying, less desirable jobs, as servicemen or local city drivers and were thereafter discriminated against with respect to promotion and transfers. Secondly, Plaintiffs alleged that the collective bargaining agreement between the Company and the Union contained a seniority system that set forth specific criteria which directly affected an employee's benefits, such as vacations, pensions, layoffs and recalls. The practical effect of the seniority system required a city driver or serviceman who transferred to a line driver job to forfeit all competitive seniority. The vice of this arrangement was that it "locked" minority workers to inferior jobs and perpetuated prior discrimination by discouraging transfers to jobs as line drivers.

With regard to Plaintiff's first complaint of intentional discrimination, the Supreme Court, in applying the disparate treatment analysis of McDonnell Douglas v. Green found that the Company had engaged in systematic and purposeful employment discrimination. Teamsters, 431 U.S. at 343. In connection with Plaintiff's second complaint concerning the detailed seniority system which locked minority workers into inferior jobs and perpetuated prior discrimination, the employer and Union defended on the basis of Section 703(a) of Title VII which provided an exception to discrimination for a bona fide seniority system.

Although this defense ultimately prevailed, the Supreme Court noted that the detailed seniority system would more reasonably fall within the test set forth in Griggs v. Duke Power Co., 401 U.S. 424 28 L.Ed 2d 158, 91 S.Ct. 849 (1971). This Honorable Court held:

> Were it not for Section 703(a), the seniority system in this case would seem to fall under the Griggs rationale. The heart of its system is its allocation of the choices job, the greatest protection against lay-offs, and other advantages to those employees who have been line drivers for the longest time.
>
> Teamsters, 431 U.S. at 349.

It seems clear that a distinction is drawn by the Courts between the disparate treatment and disparate impact analysis. Where there exists a specific, facially neutral selection criterion that can be shown to have a causal connection to a racial imbalance in the work force, then the Courts will apply the disparate impact analysis. However, as has been held by this Honorable Court and the Fifth Circuit Court of Appeals, where there exists a purely discretionary and subjective hiring process, the disparate treatment analysis is applicable. While this distinction has not been examined by each and every circuit, it has been the basis of a majority of the holdings in those cases cited by Petitioner as being in conflict with the Fifth Circuit's holdings. See, Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985) (use of a facially neutral promotion system which involved selection of employees to fill temporary positions to

learn a job position, which ultimately became a requirement for a job promotion); Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982) (use of separate and distinct hiring procedure for former employees versus normal method of hiring new employees); Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) (use of multi-component promotion process including promotion advisory boards, awards, discipline and written tests).

It is respondents position that a clear distinction has been drawn by this Honorable Court and adopted by the Fifth Circuit regarding the application of the disparate treatment and disparate impact models. Where there exists a specific, facially neutral selection criterion or procedure which adversely impacts a protected group, then the disparate impact model may be applied. However, where the selection criterion is purely selective and discretionary, the disparate treatment model is applicable. In the case at bar, the evidence was clear that the question of hiring and promotion was a discretionary and subjective matter which rested in the hands of several bank supervisors. Accordingly, the disparate treatment model was the proper test in determining petitioner's claim of racial discrimination.

II. THE FIFTH CIRCUIT'S RECOGNITION OF THE USE OF DIFFERENT MATHEMATICAL STATISTICS TO MEASURE THE VARYING RESULTS OF AN EMPLOYER'S ACTS IN HIRING AND PROMOTION DOES NOT PRECLUDE CERTIFICATION OF THESE TWO GROUPS INTO A SINGLE CLASS.

Petitioner is wrong in asserting that the Fifth Circuit has held in the case at bar that the use of different mathematical statistics to measure the varying results of an employer's acts in hiring and promotion necessarily precludes the certification of these two groups into a single class. Such is clearly not the holding of the Fifth Circuit in the case at bar. Petitioner goes on to assert that the Fifth Circuit Court of Appeals misread General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed. 2d 740 (1982). To the contrary, the Fifth Circuit correctly interpreted and applied Falcon to the facts in the instant case.

A District Court's class certification order is reviewed under an abuse of discretion standard. Jenkins v. Raymark Industries, Inc., 782 F.2d 468 (5th Cir. 1986). In the case at bar, the District Court originally certified a class consisting of blacks who applied or who were employed by the defendant. Subsequently, the District Court de-certified this broad class of employees and applicants because the District Court concluded in light of all the evidence at trial, that there was not a common question of law and fact between the unsuccessful black applicants and those blacks employed by the bank. The District Court further de-certified the employee class because it did not meet the new numerosity requirement of Rule 23(a) of the Federal Rules of Civil Procedure.

In the case at bar, the Fifth Circuit's opinion acknowledges the general rule in Falcon that a Title VII class action, like any other class action may only be certified if the Trial Court is satisfied that the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure have been satisfied. Watson v. Fort Worth Bank & Trust, 798 F.2d 791, 795, (5th Cir. 1986). Furthermore, the Court also acknowledges the exception to the general rule as set forth in footnote 15 of the Falcon opinion and the exception as set forth in Chief Justice Berger's concurring and dissenting opinion. Watson, 798 F.2d at 795-96. Nonetheless, the Fifth Circuit gives tacit approval to the holding of the District Court that Petitioner failed to show the existence of common questions between the applicants and employees claims, in that the same individual was not responsible for both hiring and promotion decisions. Watson, 798 F.2d at 796. However, the Fifth Circuit went one step further. The Court went on to assume that the exception as set forth in footnote 15 of Falcon was satisfied. The Court then holds:

> Assuming, arguendo, that Watson is correct, this Court's inquiry does not end with that conclusion. We cannot conclude that certification of a class of both employees and applicants is mandated merely because common questions exists. Rather, other factors enunciated in Rule 23(a) also must be considered. Thus, assuming a common question was presented in the instant case, e.g., whether the same limited group of white supervisors discriminated in both hiring and promotions. That common question was not in fact a central feature in the actual proof presented at trial. The applicant class claims relied primarily on applicant flow statistics. In contrasts, the proof asserted in support of the promotions claims focused on statistical evidence of the banks

> treatment of black individuals in the employee evaluation process, promotions process, compensation process and other employment practices. Consequently, the actual proof presented demonstrates that Watson's promotion claim was not typical of the applicant class claims, and she was not an adequate class representative.
>
> Watson, 798 F.2d at 796.

Thus, the Fifth Circuit's holding does not stand for the proposition that a group of applicants and current employees can never be certified as one class simply because different statistical evidence may be used by the separate group. In fact, petitioner has assumed that different mathematical statistics must always be used by these two groups. The essence of the Fifth Circuit's holding in the case at bar is simply that the statistical evidence presented by the applicant class was so significantly different than the statistical evidence presented by the employee class, that petitioner (as an employee) was not an adequate representative of the applicant class within the meaning of Rule 23(a).

Petitioner asserts that the Fifth Circuit has drained all meaning from footnote 15 of the Falcon opinion. To the contrary, the Fifth Circuit gave petitioner the benefit of the doubt in assuming arguendo that petitioner fell within the exception as set forth in footnote 15 of the Falcon opinion. However, Petitioner could still not satisfy Rule 23(a) in that Petitioner was not an adequate representative for the applicant class. The holding by the Fifth Circuit in the case at bar is not in

conflict with the law of other circuits as cited by Petitioner. For instance, Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982) (cited by Petitioner), deals with the certification of two separate classes. One class was comprised of individuals denied promotion, while another class was comprised of individuals who had been wrongfully discharged. In that case, the Court found that Phyllis Mosley was a proper class representative for both the promotion class and the discharge class. However, the facts show that Mosley had been denied promotion and had been discharged from her telephone clerk position on account of her race. Paxton, 688 F.2d at 563 and 566. Furthermore, there is nothing inconsistent with the Paxton Court's application of Falcon and the application of Falcon by the Fifth Circuit in the case at bar.

In Holsey v. Armour & Co., 743, F.2d 199 (4th Cir. 1984) (cited by Petitioner), the Court's application of Falcon is consistent with the application of Falcon by the Fifth Circuit Court of Appeals. In Holsey, the Court refused to affirm a single class of promotion and hiring claims because the District Court made no finding that the supervisors who had made the challenge promotions decisions were the same persons who made hiring decisions. The Court held that, ."although the certification question is a close one, we conclude that the significant proof for single class treatment required by Falcon is lacking in this case, and thus the plaintiffs cannot

adequately represent the outside applicants for sales and supervisory positions." Holsey, 743, F.2d at 216. Finally, McKenzie v. Sawyer, 684, F.2d 62, (D.C. Cir. 1982) deals with an unrelated issue of the application of Title VII relief to various members of a class once liability has been established.

It is clear that the Fifth Circuit's holding in the case at bar is consistent with Falcon. The Fifth Circuit's holding does not preclude the certification of a class of applicants and employees merely because these groups might use different mathematical statistics. Rather, the Fifth Circuit's holding in the case at bar simply reflected that the significantly different statistical evidence proferred by the class of applicants and the class of employees reflected that petitioner was not an adequate class representative for the applicant class.

III. THE FIFTH CIRCUIT'S DECERTIFICATION OF THE EMPLOYEE CLASS ON THE BASIS THAT IT FAILED TO MEET THE NUMEROSITY REQUIREMENT OF RULE 23(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE IS NOT IN CONFLICT WITH THE DECISIONAL LAW OF THE SIXTH, THE EIGHTH AND THE TENTH CIRCUITS.

In its opinion below, the Fifth Circuit held that a District Court's class certification order is reviewed under an abuse of discretion standard. Watson, 798 F.2d at 795; Jenkins v. Raymark Industries, Inc. 782 F.2d 468 (5th Cir. 1986). It is well settled that the determination of the propriety of a class action is ordinarily a matter within the sound discretion of the trial court. Foster v. Sparks, 506 F.2d 805 (5th Cir. 1975); Wright v. Stone Container Corp., 524 F.2d 1058 (8th Cir. 1975); Hornreich

v. Plant Industries, Inc., 535 F.2d 550 (9th Cir. 1976); Gold Strike Stamp Co. v. Christensen, 436 F.2d 791 (10th Cir. 1970). The Court below held that it found no abuse of discretion in the District Courts class decertification decision. Watson, 798 F.2d at 799. The Fifth Circuit's review of the trial court's decisions concerning the viability of the class actions in the case at bar was based on an abuse of discretion standard, and the Fifth Circuit determined that the trial court did not abuse that discretion. This analysis and holding is not in conflict with the law of the Sixth, Eighth and Tenth Circuits, rather, it is in accord with the standard of review invoked by those circuits.

Petitioner cites three cases to this Honorable Court which Petitioner claims are in conflict with the holding of the Fifth Circuit in the instant case. In Cross v. National Trust Life Insurance Co., 553 F.2d 1026 (6th Cir. 1977), the Sixth Circuit reversed the trial court's determination and denial of a particular class. The Sixth Circuit initially stated the well settled rule that the District Court has broad discretion in determining whether a case can proceed as a class action. Cross, 553 F.2d at 1030. In that case, the trial court had inaccurately determined the parameters of the actual class. The trial court originally applied the class to only black sales agents in a specific group. The Sixth Circuit held that the class had not been defined properly in that it would have been much larger if the trial court had defined the class properly. In that regard,

the trial court's denial of the certification of the class on the basis of the numerosity requirement was improper.

In Horn v. Associated Wholesale Grocers, Inc., 555 F.2d 270 (10th Cir. 1977), the trial court refused to decide whether to certify the proposed class until after the trial on the merits. At that time, the trial court denied certification of the class on the numerosity requirement alone. The Tenth Circuit, in holding that the failure to certify the class was error, based its decision on the combination of the postponement of the question of certification and the denial of certification on the numerosity requirement alone. The Court held, "the postponement coupled with denial on this ground (numerosity) was unwarranted." Horn, 555 F.2d at 275. Finally, Petitioner cites the Court to Paxton v. Union National Bank, 688 F.2d 552 (8th Cir. 1982). In that case, the Eighth Circuit cited Horn in attacking the practice of delaying certification of a class until after the trial on the merits is completed. Paxton, 688 F.2d at 558. Furthermore, as previously discussed, Paxton dealt with the certification of two classes which consisted of a promotion class and a discharge class. The facts in Paxton showed that the class representative for the promotion class (Mosley) was a proper representative of the discharge class as well. The facts reflected that Mosley had been denied various promotions and had been discharged on the basis of her race.

Although Petitioner attempts to argue that the Fifth Circuit's affirmance of the trial courts decertification of the employee class in the instant case is in conflict with the decisions of other circuits, it is clear that the Fifth Circuit merely applied the proper abuse of discretion standard in determining whether the trial court's decertification of the class was proper.

IV. THE FIFTH CIRCUIT'S ACTION IN DISREGARDING CERTAIN EVIDENCE AND PROCEEDING TO AFFIRM THE TRIAL COURT'S JUDGMENT ON THE BASIS OF THE REMAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW ENTERED BY THE TRIAL COURT WAS NOT IN CONFLICT WITH THIS HONORABLE COURT'S DECISION IN LEHMAN V. TROUT, 465 U.S. 1056 (1984).

Petitioner attempts to argue that the Fifth Circuit disregarded an underpinning of the District Court's judgment, and thereafter proceeded to affirm the judgment on other grounds. Petitioner contends that this practice is in conflict with the decision of this Honorable Court in Lehman v. Trout, 465 U.S. 1056 (1984). First, the trial court's conclusion of law number eight, sets forth an analysis of the bank's decision to promote Kevin Brown instead of Petitioner to a motor bank supervisor in February 1981. The Court details the evidence presented at trial which included that Brown's supervisor regarded him highly for his performance as a teller and his experience as her assistant. Furthermore, the evidence reflected that Brown got along well with other employees while Petitioner had some difficulty in her relationship with co-workers. The bank also relied on Brown's experience in supervising 30 to 40 temporary workers at Six Flags

Over Texas. The Court also noted that Plaintiff was out on sick leave when the position came open in 1981. In contrast, Brown was available immediately to assume the motor bank position. Although the bank did not rely on the fact that Plaintiff was out on sick leave at the time the position became open, the evidence was presented at trial without objection and was properly before the trial court.

On appeal, the Fifth Circuit detailed the evidence surrounding the Bank's promotion of Kevin Brown over Petitioner. The Fifth Circuit, in applying the clearly erroneous standard of review, gave Petitioner the benefit of the doubt and disregarded the evidence that Petitioner was on sick leave when the positions became available. However, the remaining evidence before the trial court was sufficient to uphold the trial court's finding and establish that the trial court's action was not clearly erroneous.

In Lehman v. Trout, this Honorable Court was presented with a different situation. It that case, a class of female professional employees alleged that they had been discriminated against on the basis of their sex in violation of Title VII. The District Court found discrimination in both hiring and promotion. On appeal, the Court of Appeals found that the District Court erred in its finding concerning discrimination in hiring in that the District Court had considered certain employment decisions as being actionable, when in fact, the hiring decisions and the

pre-1972 discrimination were not actionable. The United States Supreme Court granted writ of certiorari and vacated the judgment. The case was remanded to the District Court on the question of what evidentiary value Respondent and Petitioner's statistical evidence would have in light of the Court of Appeal's conclusions that certain employment decisions were not actionable. In Lehman, the trial court had committed error in concluding that certain conduct was in fact actionable under Title VII. Petitioners had apparently presented varying statistical evidence on both their hiring and promotion claims. Once the hiring claims were determined not to be actionable by the appellate court, it would seem logical that the trial court would have to reconsider the evidence presented and determine whether it was sufficient to support the remaining claim.

In the case at bar, the trial court committed no error in considering the fact that Petitioner was on sick leave at the time the positions became available. That evidence was presented before the Court without objection and was properly before the Court in reaching it conclusions of law. Furthermore, the Fifth Circuit gave Petitioner the benefit of the doubt in applying the clearly erroneous standard of review by disregarding this particular evidence. The Fifth Circuit's action was proper and was not in violation of the decision of this Honorable Court in Lehman v. Trout.

V. THE FIFTH CIRCUIT'S HOLDING THAT THE TRIAL COURT'S FINDING THAT THE BANK'S EXPLANATIONS FOR ITS ACTIONS WERE NOT PRETEXTS FOR DISCRIMINATION WAS NOT CLEARLY ERRONEOUS WAS PROPER AND IN ACCORD WITH THE DECISIONS OF THIS HONORABLE COURT AND NOT IN CONFLICT WITH THE DECISIONAL LAW OF THE SECOND, EIGHTH AND ELEVENTH CIRCUITS.

Petitioner asserts that the alleged inconsistencies in the bank's explanations for its actions apparently precluded the trial court from determining that the explanations were not pretexts for discrimination. Apparently, Petitioner would also suggest that the inconsistencies would preclude the Fifth Circuit from upholding the trial court's finding. In reviewing the District Court's determination that the bank's explanations were not pretexts for discrimination, the Fifth Circuit relied on several decisions of this Honorable Court in explaining the standard of review:

> After hearing all the evidence, including the statistical evidence, the District Court concluded that the reasons offered by the bank were not pretextual. We judge this holding under the clearly erroneous standard. Pullman-Standard v. Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed 2d 66 (1982). We conclude that the District Court's findings that the bank's explanations for its action were not pretexts for discrimination is not clearly erroneous. The District Court's finding will not be set aside unless the Court on the entire evidence is left with the 'definite and firm conviction that a mistake has been committed.' United States v. United States Gypsum Co., 333 U.S. 364, 68 S.Ct. 525 92 L.Ed 2d 746 (1948). 'Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous.' Anderson v. City of Bessemer City, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed 2d 518 (1985).
>
> Watson, 798 F.2d at 798.

Although the Fifth Circuit did recognize that the reasons articulated for Kevin Brown's promotion were somewhat

inconsistent with the bank's articulated reasons for the promotions of other employees, the Court went on to hold that the inconsistency was not so striking as to make the bank's proffered reasons incredible. Watson, 798 F.2d at 799. It was the Fifth Circuit's opinion that the record supported "two permissible views of the evidence," and therefore, the trial court's finding regarding the Brown promotion was not clearly erroneous. Watson, 798 F.2d at 799.

Petitioner cites this Court to its holding in Anderson v. Bessemer City for the proposition that the Courts of Appeals are free to discredit obvious inconsistencies. However, in Anderson, the Supreme Court reversed the Appellate Court for failing to stay within the guidelines of the clearly erroneous standard. In Anderson, the Supreme Court stated that "the standard plainly does not entitle a reviewing Court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. In applying the clearly erroneous standard to the findings of a District Court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." Anderson, 84 L.Ed 2d at 528. In Paxton v. Union National Bank, 688 F.2d 552, 566 (8th Cir. 1982), the Court also applied the purely erroneous standard. Paxton, 688 F.2d at 564. In applying that standard,

the Court in Paxton found that the evidence before the trial court reflected that the Defendants offered little or no evidence to explain the disparaties in promotions. Furthermore, no explanation whatsoever was proffered by Defendants to justify the salary discrimination between blacks and whites who were promoted within the same salary ranges. Paxton, 688 F.2d at 566. Under those facts and circumstances, the evidence simply did not allow for two permissible views of the evidence. However, the facts before the trial court in the case at bar clearly established, despite some inconsistencies, that there were two permissible views of the evidence. Petitioner's reliance on Grant v. Bethleham Steel Corporation, 635 F.2d 1007, 1014 (2nd Cir. 1980), is misplaced in that there is no inconsistency between that case and the Fifth Circuit's holding in the instant case.

The Fifth Circuits holding in the instant case properly applied the clearly erroneous standard of review confirming the trial court's finding that the bank's explanation for its actions was not pretexts for discrimination. The evidence before the trial court in the case at bar established that there are two permissible views of the evidence, and, accordingly, the fact finder's choice between them cannot be clearly erroneous. The Fifth Circuit properly followed the clearly erroneous standard of review as has been set forth by this Honorable Court in the cases cited hereinabove.

CONCLUSION:

For the foregoing reasons, Respondent prays that Petitioner's application for writ of certiorari be denied.

Respectfully submitted,

GANDY MICHENER SWINDLE
WHITAKER & PRATT
2501 Parkview Drive, Suite 600
Fort Worth, Texas 76102
(817) 335-4417

JOHN V. HOWARD
JOSEPH W. SPENCE
BRUCE W. McGEE

By: 
BRUCE W. McGEE

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above named was forwarded by certified mail, return receipt requested, to Mr. Art Brender, 930 Capital National Bank Building, 110 West 7th Street, Fort Worth, Texas 76102 this 19th day of March, 1987.


BRUCE W. McGEE